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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 623

AMERICAN CAR AND FOUNDRY COMPANY,
PETITIONER,

vs.

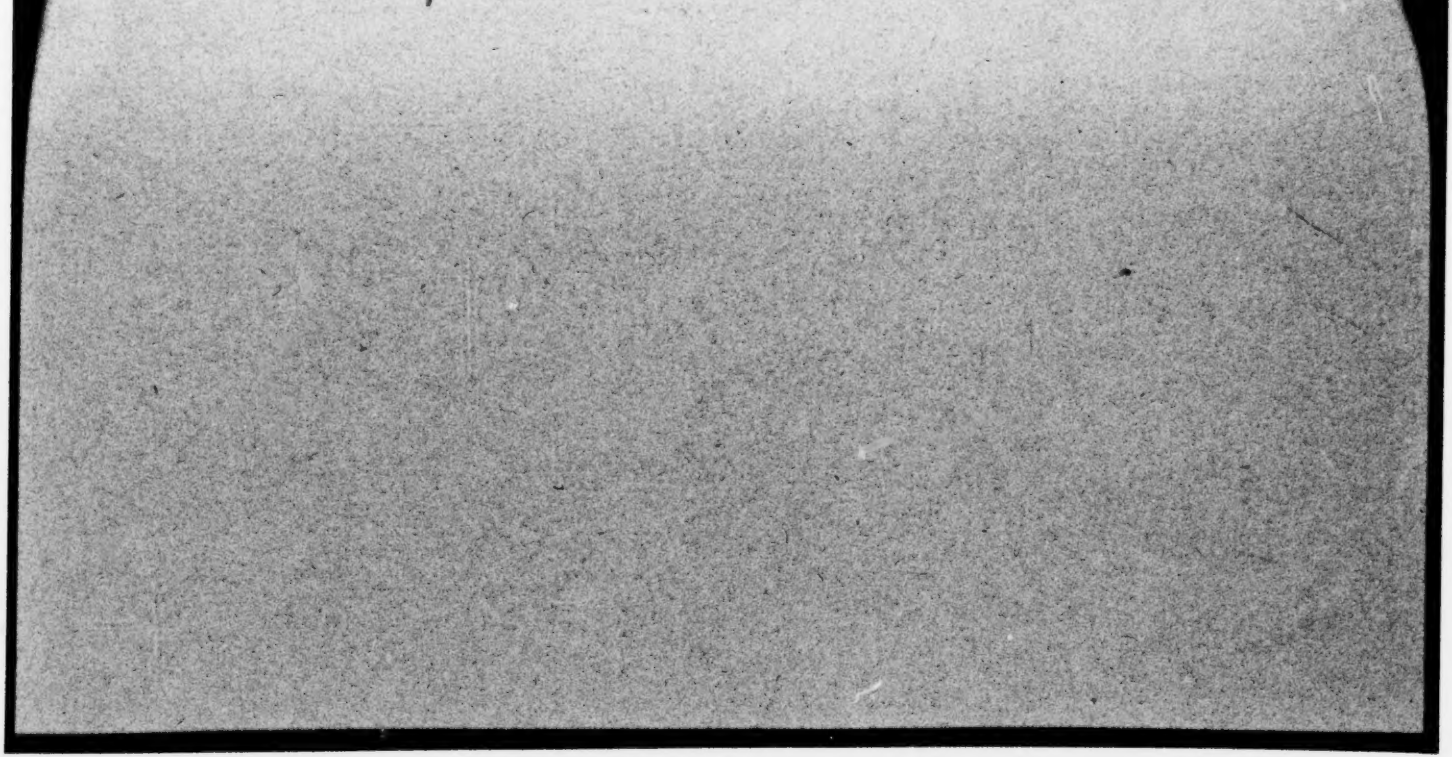
H. A. BRASSERT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 13, 1933

CERTIORARI GRANTED FEBRUARY 13, 1933

(37,320)



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1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable George A. Carpenter, District Judge of the United States for the Northern District of Illinois on 30th day of November, in the year of our Lord one thousand nine hundred and thirty-one, being one of the days of the regular November Term of said Court, begun Monday, the Second day of November, and of our Independence the 156th year. Placita.

Present:

Hon. George A. Carpenter.
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

PAGE CUT

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

American Car and Foundry Company, a corporation
vs.
H. A. Brassert
} No. 39707

Be It Remembered, that the above-entitled action was commenced by the filing of the following Libel in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 6th day of July, 1931.

July 6, L. 3 * * (Caption) * *

To the Honorable Judges of the District Court of United States for Said District:

The libel of American Car and Foundry Company, a corporation, against H. A. Brassert in a cause civil and maritime, alleges as follows:

I.

That at the different times hereinafter mentioned the American Car and Foundry Company was, and now is, a corporation organized and existing under and by virtue of the laws of the state of New Jersey; that said company during several years last past was, and now is, engaged in the manufacture and sale of gasoline propelled yachts and cruisers; that in the usual course of business after delivery to the purchaser, ownership in said yachts and cruisers so manufactured is retained by said American Car and Foundry Company until the purchaser has made payment of the total amount of the purchase price due.

II.

That on or about the 9th day of June, 1930, H. A. Brassert, the respondent herein, entered his order for one American Car and Foundry Company (hereinafter referred to as A. C. F. Co.) cruiser, model 38′, with standard equipment, f. o. b. Wilmington, Delaware; that the said order was accepted by
4 an officer of said A. C. F. Co., and is in words and figures as follows:

"American Car and Foundry Company
30 Church Street, New York, N. Y.

Order No. 302
Chicago, Ill.
June 9, 1930

Gentlemen:

Please enter my order for 1 A. C. F. Cruiser, Model 38′ with your Standard Equipment (except as otherwise specified herein) to be delivered on or about June 23, 1930 FOB at American Car and Foundry Company's plant, Wilmington, Delaware, at the price and upon the terms herein stated.

Remarks		Price
(Name of cruiser, etc.)	Price of cruiser delivered as above	$13,500.00
	Extra equipment desired: forward cockpit cover	55.00
	Cradle & Loading charge	380.00
	Total price of cruiser	$13,935.00
	Credits:	
	Deposit	$ 3,000.00
	Balance due on delivery of cruiser	$10,935.00

4000 on delivery, balance in 90 days

If full payment for the cruiser is not made within ten days after mailing notification that cruiser is ready for delivery you shall have the right to cancel this order and to retain the deposit and all other payments made as liquidated damages.

The cruiser herein ordered is subject to the warranty appearing on the reverse hereof and no other.

Your obligation with respect to delivery is subject to delays attributable to fires, accidents, labor difficulties, delays of

carriers or in receipt of materials or any other like or unlike causes beyond your reasonable control.

Title to the Cruiser and all equipment herein ordered shall remain in you until same has been fully paid for.

This order is non-transferable and shall not be binding on you until it has been approved by an officer of American Car and Foundry Company.

Purchaser H. A. BRASSERT
Business address 310 So. Mich. Ave
Chicago, Ill.

Salesman WARD A. ROBINSON Residence address 547 Roslyn Road, Kenilworth, Ill.

Accepted:

Approved:
AMERICAN CAR AND FOUNDRY COMPANY
By E. A. HODGE
Manager, Marine Division.

Warranty:—We warrant all goods of our manufacture against defects in workmanship and material. Our obligation under this or any implied warranty is limited to the replacement at our plant of all parts which shall be returned at our plant, transportation prepaid, within the ninety days next following the date of our shipment and which our examination shall disclose to have given out under normal use and service because of any such defect, provided that if the circumstances are such as in our judgment to make impracticable such replacement at our plant, then our sole obligation shall be the shipment, without charge, of parts replacing those so found to be thus defective. We accept no responsibility with respect to any of our products that have been repaired or in any way altered outside of our plant."

III.

That said H. A. Brassert instructed the said A. C. F. cruiser to be shipped by said A. C. F. Co. to said H. A. Brassert at Chicago, Illinois; that said A. C. F. cruiser, as ordered, No. T29, and named "Orion", was shipped and received by said H. A. Brassert at Chicago, Illinois, in good order and condition; that said A. C. F. cruiser was designed and equipped in accordance with the requirements approved by the National Board of Fire Underwriters and, except for

carelessness in operation, was made as safe as prac-
6 ticable from explosion and fire; that said A. C. F. cruiser was equipped with motors and all appurtenances and appliances of modern design and construction and well suited for the uses represented and intended; that said A. C. F. cruiser when delivered to said H. A. Brassert was sturdy, safe and seaworthy.

IV.

That on the 20th day of June, 1930, an agreement was entered into by and between the said parties in words and figures as follows:

"Conditional Sale Agreement

Agreement made this twentieth day of June, 1930, between American Car and Foundry Company, a New Jersey corporation (hereinafter called 'Seller') of the first part, and H. A. Brassert, of, Kenilworth, Illinois, (hereinafter called 'Purchaser') of the second part.

Witnesseth:

1. The Seller agrees to sell and the Purchaser agrees to buy the following described floating equipment (hereinafter called the 'boat'), viz:

One (1) A. C. F. Twin Screw Express Cruiser, having a length of 38 feet, and a beam of 9 feet; numbered T29 and named Orion.

2. The Purchaser acknowledges receipt of said boat, as above described, in good order and condition, and, in consideration of the receipt thereof, agrees to pay Seller as the purchase price thereof the sum of Fourteen Thousand Thirty-nine and 03/100 Dollars ($14,039.03), lawful money of the United States, payable at Seller's place of business, 30 Church Street, Borough of Manhattan, City and State of New York, or at such other place as Seller may designate, in the manner following: Three Thousand and 00/100 Dollars ($3,000.00) accompanying the order (receipt whereof is acknowledged by Seller), Four Thousand and 00/100 Dollars ($4,000.00) on delivery of the boat, and the balance in (1) installment of Seven Thousand Thirty-nine and 03/100 Dollars ($7,039.03) payable Ninety (90) days after delivery of the boat, which installments of purchase price is to be evidenced by negotiable promissory note made by the Purchaser to the order of the Seller, bear-

ing date hereof, and maturing on the due date of the said respective installment.

3. The delivery to and the acceptance of the boat by Purchaser shall not vest in Purchaser any title thereto or right therein other than as defined in this contract, and until payment by Purchaser of the balance of the purchase price and of all the notes provided hereby to be given, and until all the obligations of Purchaser hereunder shall have been fully complied with and performed and until payment or tender by Purchaser to Seller of One Dollar as hereinafter specified, the title to and ownership of the boat shall not pass to or vest in Purchaser but shall remain and be in Seller. Purchaser shall have and be entitled to the possession and use of the boat from its delivery hereunder, but only upon and subject to all the terms and conditions hereof.

4. Purchaser shall at all times, and at Purchaser's own expense, keep the boat insured with full marine coverage including protection and indemnity (with loss, if any, payable to Seller as its interest may appear) in a company or companies approved by Seller. The insurance coverage against loss or damage by fire shall be in an amount not less than the full amount of the notes issued hereunder outstanding and unpaid. The insurance policies, or duplicates of them, shall be delivered to and remain with Seller.

5. Purchaser shall at all times, and at Purchaser's own expense, keep the boat, the equipment thereof and all accessories thereon in good order and condition. Purchaser shall pay, as and when due, all taxes, licenses, assessments and charges of every kind assessed, rated, levied, charged or made against the boat or against Seller as its owner. Purchaser shall comply with all the laws of the United States affecting the boat and of all the States and territories in which the boat may be operated, and with all lawful acts, rules, regulations and directions of any authority exercising any power, regulation or supervision over the boat. Purchaser shall indemnify, protect and hold harmless Seller from and against any and all liability, claim, demand, cost, charge and expense in any way imposed upon or accruing to Seller arising out of or in connection with the use and/or operation of the boat.

6. Purchaser shall not assign or transfer this contract or any of Purchaser's rights hereunder without Seller's written consent first obtained. Purchaser shall not part with the possession or allow the boat to pass out of Purchaser's possession or control, except in the usual and ordinary operation of the

boat. Purchaser shall not cause or permit the boat, or any of its equipment or accessories, to be pledged or held for any taxes, debts or obligations of Purchaser, or to be in any manner encumbered by or through Purchaser. Seller may sell, transfer, pledge or assign all or any of the notes to be issued hereunder, and this contract shall continue and remain as security pro tanto for any note or notes so disposed of. Seller may assign, transfer or pledge this contract and all rights, privileges, powers and remedies hereunder at any time and from time to time as it may deem proper, but in the event of any sale, assignment, transfer or pledge of any of said notes or of this contract, the rights, powers, privileges and remedies herein given and reserved to Seller, in the event of any default by Purchaser, shall remain in Seller to be exercised, if it deems best, as Trustee, of an express trust, but in its own name for the use and benefit of all parties in interest. In the event of the transfer or assignment by Seller of this contract, or of any of said notes, and default thereafter by
8 Purchaser in the payment of any of said notes. Seller may, if it so elects, take up, acquire or pay such notes, or any of them, but in such case the note so taken up, acquired or paid shall not be considered as paid, and the holder thereof shall have as security for the payment thereof the protection and benefit pro tanto of this contract. Any extension or assignment of said notes, or any of them, or of this contract, shall not vest title to said boat in Purchaser or constitute a waiver of any of the conditions of this Agreement.

7. Upon payment in full by Purchaser of the purchase price and of all the notes issued hereunder, and upon performance by Purchaser of all of Purchaser's obligations under this contract, and upon the payment by Purchaser to Seller of the further sum of One Dollar, Seller will, at Purchaser's expense, execute and deliver to Purchaser a bill of sale or such other instrument of transfer as may be reasonably required by Purchaser as evidence of Purchaser's title to the boat and of Purchaser's compliance with the terms of this contract and as evidence that the absolute ownership of the boat is vested in Purchaser.

8. Purchaser shall be entitled to the possession and use of the boat so long as Purchaser shall observe the conditions and obligations thereof, but (1) if Purchaser shall default in the payment, at maturity, of any of the notes issued hereunder whether or not demand be made for the payment thereof; or (2) if Purchaser's property, or any part thereof, shall pass

into the possession of a receiver or receivers or a petition in bankruptcy be filed by, or against, the Purchaser, or if the Purchaser shall make a general assignment for the benefit of creditors; or (3) if Purchaser shall default in the due observance or performance of any other of the terms, provisions, conditions, covenants or obligations of this contract; or (4) if the Seller shall deem the security for the payment of said notes intended to be afforded hereby insufficient or unsafe, then and in such case, or either of such cases, Seller shall be entitled to and may at its option retake the boat, the equipment thereof and the accessories thereto, retaining all payments which up to that time shall have been made on account thereof (which amount, it is hereby expressly agreed, constitutes no more than the reasonable value of the use of the boat). For the purpose of taking such possession, Seller shall be entitled to enter upon and take and remove the boat from the premises of Purchaser, or wherever it may be found. Upon retaking or sale as herein provided for of the boat by Seller, Purchaser will relinquish all claims or rights in or to the same. Upon the occurring of any of the contingencies specified in (1), (2), (3) and (4) of this clause of this contract, all of the notes then outstanding and all other sums payable hereunder may by the holder of said notes be declared immediately due and payable, and a retaking of the boat by Seller shall not be a bar to or otherwise affect the right to recover thereon. Upon any such declaration of immediate maturity, Seller may sell the boat with or without notice to Purchaser, either at public or private sale, on such terms as it shall deem advisable. The proceeds of any such sale, after the pay-
9 ment of the necessary expenses in connection therewith and in connection with the retaking and holding of the boat, shall be applied to the payment of the outstanding notes issued hereunder. No sale or taking possession of the boat by Seller shall in any way prejudice any other right or cause of action it may have hereunder. The remedies herein created in favor of Seller shall not be deemed exclusive but shall be cumulative and in addition to all other remedies existing at law or in equity in its favor. If upon any such sale the proceeds thereof are insufficient to pay the sums remaining unpaid with respect to said notes and the expenses caused by such re-possession, removal, storage and sale, any deficiency shall be paid by the Purchaser. In the event of any such sale, Seller may become the Purchaser.

9. If the Purchaser shall fail or omit to make any payment

or to do anything which under the provisions of this contract Purchaser should make or do, then Seller itself may make such payment or do, or cause to be done, such thing, but shall not be obliged to do so. Any such payment made by Seller and the cost and expense to it for and in and about doing or causing to be done any such thing, will be a charge against Purchaser, which Purchaser agrees hereby to repay to Seller on demand with interest at the rate of six per cent per annum. The making by Seller of any such payment or the doing by it of any such thing shall not in any way prejudice or be a waiver of any right reserved or remedy available to it under this contract or otherwise because of such failure or omission by Purchaser.

Made and entered into the day and year first above written.

AMERICAN CAR AND FOUNDRY COMPANY,
By G. R. SCANLAND.

Attest:
H. C. WICK
Secretary.

(Corporate Seal) H. A. BRASSERT (L. S.)

State of Illinois }
County of ..... } ss.

I, Marion Flatley, a notary, do hereby certify that H. A. Brassert, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this 18th day of 10 June, 1930.

My Commission Expires April 7, 1931.

MARION FLATLEY.

(Notarial Seal)"

V.

That subsequent to the 20th day of June, 1930, and prior to the 18th day of August, 1930, said H. A. Brassert paid to said American Car and Foundry Company the sum of Seven Thousand Dollars ($7,000.00) as promised in said agreement, as aforesaid; that on the 18th day of August, 1930, said agreement was in full force and effect and that there was due and

owing said American Car and Foundry Company, as owner, from said H. A. Brassert the sum of Seven Thousand Thirty-nine Dollars and Three Cents ($7,039.03) as set forth in said agreement and as evidenced by a promissory note for said amount, dated June 20, 1930, signed by said H. A. Brassert as maker and payable to said A. C. F. Co. 90 days after date.

VI.

That on the 18th day of August, 1930, libellant is informed that said A. C. F. cruiser was being operated by said H. A. Brassert on the waters of Lake Michigan, one of the navigable waters of the United States, at a point about three miles from the shore of the United States Army Reservation known as Fort Sheridan, in the State of Illinois; that at the time and place stated said H. A. Brassert was cruising on the waters of Lake Michigan from the harbor at Milwaukee, Wisconsin, to the harbor at Wilmette, Illinois, and from causes unknown to said American Car and Foundry Company an explosion is alleged to have occurred midship and near the motors of said cruiser; that your libellant is informed that said explosion was followed by fire.

VII.

That said A. C. F. cruiser burned to the water's edge,
11 filled with water, was sunk and became a total wreck and loss. Said H. A. Brassert claims that he was burned by the flames and as a result thereof received injuries alleged to be serious and permanent. Said H. A. Brassert and two other persons with him (whose names and whose injuries, if any, are unknown to the libellant) in said A. C. F. cruiser at the time and place stated are alleged to have jumped into the waters of Lake Michigan with life belts and were rescued by a sea-plane from Great Lakes Naval Training Station, on the coast of Lake Michigan, Great Lakes, Illinois.

That at the time and place of the alleged explosion in question, said H. A. Brassert claims to have been in possession of on said A. C. F. cruiser certain fishing rods, tackle, guns, golf bags and clubs and other personal effects and supplies alleged to be of the value of Two Thousand Seven Hundred Dollars ($2,700.00). That all of said personal effects and supplies said H. A. Brassert claims were a total wreck and loss; that

no amount of the personal effects and supplies of the respondent on board at the time of the accident were salvaged; that said cruiser and its machinery, equipment, personal effects and supplies were a total loss and no part thereof was salvaged.

VIII.

All of the said alleged injuries and damage to the persons on board, and the loss of and damage to the property, as stated, were occasioned and incurred without the privity or knowledge of the libellant, the owner of said cruiser.

IX.

The libellant further alleges that, as it is informed and believes, certain persons or corporations, insurer of said cruiser and of property on board, and lost or damaged by and at the time of the loss of said cruiser as aforesaid; certain other persons who claim to have been on board said
12 cruiser at the time of the loss aforesaid, and to have suffered in consequence thereof injuries and damage to their persons and property; and still other persons, claiming to be entitled to recover and receive large sums of money on account of injuries to said persons so represented by them—all make, or may hereafter make, claim that the explosion and fire, and sinking and wreck of said cruiser, and also claim that the injury and damage to persons and property as aforesaid, were occasioned and incurred from the fault and neglect of the libellant, or its officers and agents, and that the libellant is liable and responsible to pay to them the loss and damages arising as aforesaid; all of which claims and allegations the libellant denies, and on the contrary it alleges that all such losses and damages as alleged were occasioned or incurred without its neglect, fault, privity or knowledge, and without the neglect or fault, privity or knowledge of its officers or agents, or any or all of them.

X.

The alleged losses and damage to persons and property incurred and occasioned by the said explosion, fire, sinking and loss of said cruiser and the alleged claims and liabilities made against the libellant by reason thereof greatly ex-

ceed the amount or value of the interest of the libellant as owner in said cruiser, her machinery, tackle, furniture and supplies, immediately after said loss. Upon and after the happening of said loss, said cruiser, her machinery, tackle, furniture and supplies became a wreck and total loss and the libellant is informed and believes were then practically worthless, and the libellant's interest therein became and was of little or no value.

XI.

The libellant while not admitting but denying that it is under any liability for the acts, losses and damages
13 aforesaid, and desiring and claiming the right in this court to contest any such liability of itself or of the said cruiser, claims and hereby alleges that it is entitled to have limited its liability as owner therefor (if any such liability shall hereafter be found to exist) to the amount or value of its interest as owner in said cruiser after said loss.

XII.

Said cruiser in her damaged and wrecked condition now lies sunken approximately three miles from the shore at Fort Sheridan, State of Illinois, within this district and within the jurisdiction and process of this Honorable Court.

XIII.

The libellant claims and petitions that in case it should be found that there is any liability for the acts, losses and damages aforesaid, upon said cruiser "Orion", or upon the libellant, as owner thereof, (which liability the libellant does not admit, but expressly and wholly denies and desires in this court to contest) such liability shall in no event exceed the amount or value of the interest of the libellant as owner in said cruiser immediately after said loss, and as provided by the third and fourth sections of the Act of March 3, 1851 entitled "An Act to limit the liability of ship owners and for other purposes", now embodied in Sections 4283 to 4285 of Revised Statutes, as now or hereafter amended or supplemented, said Section 4283 of Revised Statutes providing as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and
14 her freight then pending."

XIV.

The libellant, therefore, prays that all claims for loss, damage or injury to persons or property by reason of the premises be heard and determined in this court; that the amount or value of the interest of your libellant, as owner of such vessel, immediately after said loss be apportioned according to law; that due appraisement be ordered and made of the said cruiser, her machinery, supplies and furniture at the time of the loss. Your libellant offers to pay the appraised value into court, or to give a stipulation with good and sufficient sureties or an approved corporate surety, whenever the same shall be ordered, and to do all acts and things as required by the rules of this court or in the exercise of its legal discretion.

XV.

Your libellant also prays that a monition in due form be issued against the said H. A. Brassert and any and all persons or corporations claiming damages for any injury, loss, destruction or damage, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than thirty days from the issuing of the same; that public notice of such monitions be ordered as in other cases, and such further notice served through the post office, or otherwise as the court in its discretion may direct; that the court shall also on application of your libellant as owner of said cruiser, make an order to restrain the further prosecution of all and any suit or suits and of all and any action or actions against said libellant, now pending or hereafter filed in respect to any such claim or claims.

15 XVI.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, libellant prays that process in due form may issue against the said H. A. Brassert; that this Honorable Court will be pleased to pronounce in favor of libellant's petition; that this libellant may have such other and further relief as in law and justice it may be entitled to receive.

AMERICAN CAR AND FOUNDRY COMPANY
By H. C. WICK
Secretary

HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Proctors for Libellant.

State of New York, } ss.
County of New York, }

H. C. WICK, being first duly sworn, deposes and says that he is the duly elected and acting secretary of American Car and Foundry Company, that he has read the foregoing libel and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

H. C. WICK

Subscribed and sworn to before me this 4th day of April, 1931.

H. NORMAN SPY
(Notarial Seal) *Notary Public, Queens County.*

(Stamped) Queens Co. Clk's No. 3360 Register's No. 3948
New York Co. Clk's No. 1836 Register's No. 281204
King's Co. Clk's No. 441 Register's No. 2706
Term expires March 30th, 1932

16 And on, to wit, the 6th day of July, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Libellant's Stipulation in words and figures following, to wit:

17 LIBELLANT'S STIPULATION. Filed July 1931.

United States of America,
Northern District of Illinois, } ss.
Northern Division.

UNITED STATES DISTRICT COURT,

Sept. Term, A. D. 1931.

Whereas, a libel was filed in this Court on the 6th day of July, A. D. 1931, by American Car and Foundry Company, a corp., against H. A. Brassert, for the reasons and causes in said libel mentioned; and praying that the same may be condemned, and sold to answer the prayer of the libelant; and the said libelant and Paul R. Conaghan, surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libelant, or surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars.

Now, Therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of two hundred and fifty dollars, conditioned that the libelants above named shall pay all such costs as shall be awarded against it by this Court, or, in case of appeal, by the Appellate Court.

AMERICAN CAR AND FOUNDRY CO.
a corp

PAUL R. CONAGHAN

Taken and acknowledged this 6th day of July, A. D. 1931, before me.

.....
U. S. Commissioner.
JOSEPH A. MUIR
Deputy Clerk

(Seal)

Northern District of Illinois:—ss.

PAUL R. CONAGHAN, party to the above stipulation, being duly sworn, deposes and says that he resides in the Northern District of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

PAUL R. CONAGHAN

Sworn this 6th day of July, A. D. 1931, before me.

JOSEPH A. MUIR
Deputy Clerk

(Seal)

Sept. 8, 1931

18 And on, to wit, the 8th day of September 1931 came the Respondent by his attorneys and filed in the Clerk's office of said Court a certain Exceptions to Libel in words and figures following, to wit:

19 * * (Caption) * *

EXCEPTIONS TO LIBEL.

To the Honorable Judges of the District Court of the United States for Said District:

The Respondent, H. A. Brassert, hereby excepts to the libel herein in the following respects:

1. That it does not disclose that the Libelant was the owner of the motor boat "Orion" at the time of its destruction by explosion and fire, as therein alleged.

2. That it does not disclose that the Libelant was the owner of said motor boat "Orion" in such manner and to such extent as to warrant the maintenance of a proceeding to limit the liability of ship-owners.

3. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any
20 time prior thereto, said motor boat "Orion" was engaged or was being used by Libelant in maritime commerce upon the high seas and/or upon the navigable waters of the United States.

4. That it does not disclose that at the time of its destruction by explosion and fire, as therein alleged, or at any time prior thereto, the said motor boat "Orion" was engaged or was being used by Libelant in the transportation of passengers and/or freight for hire upon the high seas and/or upon the navigable waters of the United States.

5. That it does not disclose that at the time of the destruction of the motor boat "Orion" by explosion and fire, as therein alleged, Libelant was a "ship-owner" within the meaning of that term as used in Sections 183 to 189, inclusive, U. S. C. A., Chapter 8, Title 46, or any other acts or statutes of the United States limiting the liability of "ship-owners."

6. That it does not disclose that at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, or at any other time, Libelant was engaged

in the business of building and operating ships or boats of any kind in marititme commerce upon the high seas and/or upon the navigable waters of the United States.

7. That it does not disclose that at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, or at any other time, Libelant was engaged in the business of shipping upon the high seas and/or upon the navigable waters of the United States.

8. That it does not disclose that there was no freight or passenger money pending at the time of the destruction of said motor boat "Orion" by explosion and fire, as therein alleged, to be surrendered and applied as provided by law.

21 9. That it does not disclose that Libelant exercised due care and diligence in selecting a competent master and crew for said motor boat "Orion".

10. That it does not disclose that the motor boat "Orion" was properly officered and equipped at and before its destruction by explosion and fire, as therein alleged.

11. That it does not disclose that the person before whom it was verified was authorized to administer oaths in the State of New York where said verification was taken.

12. That it does not disclose that the contract set forth in Paragraph 4 thereof is not personal, creating a personal liability on Libelant and therefore is not within the statutes of the United States limiting the liability of ship-owners.

13. That it does not disclose facts sufficient to justify limiting the liability of Libelant.

14. That it does not disclose that a Court of Admiralty has jurisdiction of the subject-matter of this proceeding.

In all which particulars the said libel is imperfect, insufficient and indistinct and therefore the said Respondent is not bound to answer the same and he prays that the said libel may be dismissed with costs.

Dated at Chicago, September 8, 1931.

WEST & ECKHART
Proctors for Respondent.

22 And afterwards, to wit, on the 16th day of November 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter District Judge, appears the following entry, to wit:

ed Nov. 1931.

23 * * (Caption) * *

Monday, November 16, 1931.

Present: Honorable George A. Carpenter, Judge of said Court.

This cause coming on to be heard upon the exceptions of the respondent to the libel filed in said cause and after arguments of counsel and due deliberation by the court said exceptions are sustained to which ruling of the court the libellant by its proctors here and now duly except and ten (10) days time from this date is allowed the libellant within which to amend its libel or stand on the same.

ed Nov. 1931.

24 And afterwards, to wit, on the 30th day of November, 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to wit:

25 * * (Caption) * *

DECREE.

This matter coming on to be heard on motion of Respondent by his proctors that the libel be dismissed, and it appearing that Libellant has not amended its libel, and Libellant being present by its proctors who state to the court that Libellant has elected to stand on its libel;

It Is Hereby Ordered and Decreed that the libel be and the same is hereby dismissed.

To which order and decree the Libellant by its proctors objects and excepts.

Enter this 30th day of November, 1931.

CARPENTER
Judge.

26 And on, to wit, the 30th day of November, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

27 * * (Caption) * * Filed Nov. 1931.

PETITION FOR APPEAL.

To the Honorable George A. Carpenter, Judge of said District Court:

Now comes American Car and Foundry Company, a corporation, Libellant in the above cause, and feeling aggrieved by the decree of this court entered herein on the 30th day of November, 1931, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the Assignment of Errors filed herewith, and prays that its appeal be allowed and that citation be issued directed to H. A. Brassert, Respondent in said cause, commanding him to appear before said United States Circuit Court of Appeals to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record upon which said decree was made, duly authenticated, be sent to said Circuit Court of Appeals, and prays that the proper order relating to the security to be required of Libellant on said appeal be made.

AMERICAN CAR AND FOUNDRY COMPANY,
By HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Its Proctors.

28 And on, to wit, the 30th day of November, 1931 came the Libellant by its attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

29 * * (Caption) * *

ASSIGNMENT OF ERRORS.

Now comes the Libellant, American Car and Foundry Company, a corporation, and in connection with its petition for an appeal in the above cause, says that in the record, proceedings and decree entered in said cause there is manifest error to the prejudice of Libellant, as follows:

1. The court erred in sustaining the exceptions of the Respondent to the libel.

2. The court erred in entering a decree that the libel be dismissed.

Wherefore, Libellant prays that the decree entered in said cause be reversed.

AMERICAN CAR AND FOUNDRY COMPANY,
By HARDY, STANCLIFFE & HARDY
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING
Its Proctors.

d. Nov. 1931.

30 And afterwards, to wit, on the 30th day of November, 1931, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to wit:

31 * * (Caption) * *

ORDER.

This cause coming on to be heard on the petition of American Car and Foundry Company, a corporation, Libellant, for an order allowing it to appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and an Assignment of Errors accompanying said petition, and it appearing that notice of said petition has been given to Respondent, and Respondent being present in court by his proctors,

It Is Ordered in Open Court that an appeal be and the same is hereby granted and allowed to the Libellant, American Car and Foundry Company, a corporation, from the decree of this court entered herein on the 30th day of November, 1931, to the said United States Circuit Court of Appeals for the Seventh Circuit, and that citation issue directed to H. A. Brassert, Respondent, commanding him to be and appear before the said United States Circuit Court of Appeals to answer the said appeal.

And said Respondent by his proctors now stating to the court that Respondent waives the requiring of any appeal bond of Libellant, It Is Ordered that bond for $200. is required on said appeal.

Enter this 30th day of November, 1931.

CARPENTER
Judge.

32 And on, to wit, the 5th day of December 1931 come American Car and Foundry Company a corporation as principal and United States Fidelity and Guaranty Company, a corporation as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to wit: Filed Dec. 1931.

33 Know all Men by these Presents:

That we, American Car and Foundry Company, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto H. A. Brassert in the full and just sum of Two Hundred Dollars ($200.00) to be paid to the said H. A. Brassert, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 5th day of December in the year of our Lord one thousand nine hundred and Thirty-one.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division in a suit pending in said Court, between American Car and Foundry Company, a corporation, Libellant, and H. A. Brassert, Respondent a decree was rendered against the said American Car and Foundry Company, a corporation, Libellant, and the said American Car and Foundry Company, a corporation, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said H. A. Brassert citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from November 30, 1931.

Now, the condition of the above obligation is such, that if the said American Car and Foundry Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails

to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

AMERICAN CAR AND FOUNDRY COMPANY
By G. R. SCANLAND (Seal)
V. P.

Attest:
H. C. WICK,
Secretary.

Sealed and delivered in presence of:

.....

.....

UNITED STATES FIDELITY AND GUARANTY Co. a corporation
By H. W. SHIELDS
Attorney in fact.

12/2/31

O. K. WEST & ECKERT

Approved by:
CARPENTER.

5 Dec. 1931

(Endorsed) No. 39707 United States District Court Northern District of Illinois Eastern Division American Car and Foundry Company, a corporation, Libellant vs. H. A. Brassert, Respondent Bond on Appeal.

34 * * (Caption) * *

PRAECIPE FOR RECORD.

To the Clerk of said District Court:

You will please make up the record, in accordance with the Admiralty Rules of the Supreme Court, to be transmitted to the United States Circuit Court of Appeals for the Seventh Circuit on the appeal heretofore allowed by said District Court in the above cause, and include therein the following:

Libel.
Libellant's Stipulation.
Exceptions of Respondent to libel.
Order of November 16, 1931, sustaining exceptions to libel.
Decree of November 30, 1931, dismissing libel.
Petition for appeal filed by Libellant.
Assignment of errors filed by Libellant.

Order of November 30, 1931, allowing appeal.
Citation.
Appeal bond.
Praecipe for record, filed by Libellant.

HARDY, STANCLIFFE & HARDY,
KNAPP, BEYE, ALLEN, COCHRAN & CUSHING,
Proctors for American Car and Foundry Company, Libellant, (Appellant).

Receipt of a copy of the foregoing praecipe is hereby acknowledged, this 30 day of November, 1931.

WEST & ECKHART,
Proctors for H. A. Brassert, Respondent.

Endorsed: Filed Dec. 2, 1931. Charles M. Bates, Clerk.

35 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled American Car and Foundry Company, a corporation vs. H. A. Brassert No. 39707 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 8th day of December, A. D. 1931.

CHARLES M. BATES,
Clerk.

(Seal)

36 United States of America, } ss.

The President of the United States, To H. A. Brassert, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to the order allowing an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, in Cause No. 39707 in Admiralty in said District Court, wherein American Car and Foundry Company, a corporation, is Libellant and you are Respondent to show cause, if any there be, why the decree rendered against the said Libellant as in the said order allowing the appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George A. Carpenter, Judge of the District Court of the United States, this 30th day of November, in the year of our Lord one thousand nine hundred and Thirty-one.

GEORGE A. CARPENTER
Judge.

Service of the above citation is hereby acknowledged, this 30th day of November, 1931.

WEST & ECKHART
Proctors for H. A. Brassert, Respondent.

(Endorsed) * * (Caption) * * Citation Filed Nov 30 1931 Charles M. Bates, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 1 to 24, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on the sixteenth day of January, 1932, on which the following entitled cause was heard and determined:

American Car and Foundry Company, a corporation,
Appellant,

vs.

H. A. Brassert,
Appellee,

No. 4710, October Term, 1931, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 30th day of November, A. D. 1932.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago in the Seventh Circuit on the sixth day of October, 1931, of the October Term in the year of our Lord one thousand nine hundred and thirty-one, and of our Independence the one hundred and fifty-sixth.

American Car and Foundry Company, a corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And on the twenty-first day of December, 1931, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellant, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for the Appellant.

CHARLES J. HARDY,
NOAH A. STANCLIFFE,
30 Church Street,
New York City.
JOHN R. COCHRAN,
LEONARD F. MARTIN,
PAUL R. CONAGHAN,
208 So. La Salle Street,
Chicago, Illinois.

Endorsed: Filed December 21, 1931. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-third day of December, 1931, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for Appellee.

PERCY B. ECKHART,
ROY O. WEST,
38 So. Dearborn St.,
Chicago, Ill.

Endorsed: Filed December 23, 1931. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twelfth day of April, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 12, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company		Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
4710	*vs.*	
H. A. Brassert		

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on May 18, 1932.

And afterwards, to-wit: On the eighteenth day of May, 1932, there was filed in the office of the Clerk of this Court an Appearance of Counsel for Appellee, which said Appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931.

American Car and Foundry Company,
Appellant,

vs.

H. A. Brassert,
Appellee.

The Clerk will enter my appearance as Counsel for Appellee.

LEWIS C. JESSEPH,
38 So. Dearborn St.,
Chicago, Ill.

Endorsed: Filed May 18, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eighteenth day of May, 1932, the following further proceedings were had and entered of record, to-wit:

Wednesday, May 18, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Leonard F. Martin and Mr. Paul R. Conaghan, counsel for Appellant, and by Mr. Lewis C. Jesseph, counsel for Appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-fourth day of June, 1932, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4710. October Term, 1931, April Session, 1932.

American Car and Foundry Company, a Corporation, *Appellant*,
vs.
H. A. Brassert, *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

June 24, 1932.

Before ALSCHULER, EVANS, and SPARKS, *Circuit Judges*.

This action, which is a proceeding by a libel in admiralty, was brought by appellant to limit its liability for damage, if any, as owner of a cruiser or motor boat, which damage is claimed to have resulted to appellee's person and personal property by reason of an explosion occurring on said boat while it was being operated by appellee on Lake Michigan. The relief sought is based upon Section 3 of An Act to Limit the Liability of Ship-Owners, and for Other Purposes, which was enacted March 3, 1851, 9 Stat. 635, c. 43, R. S. Sec. 4283, 46 U. S. C., Sec. 183.*

Appellant is engaged in the manufacture and sale of gasoline-propelled yachts and cruisers, and on June 20, 1930, it and appellee entered into a written conditional agreement for the sale by appellant to appellee of the boat now in controversy. By the terms of the agreement the bare legal

* 46 U. S. C., Sec. 183:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

title to the boat was retained by appellant until the purchase price of $14,039.03 was paid. Of that amount appellee paid $3,000 when he signed the agreement, and upon delivery of the boat he paid an additional sum of $4,000. For the balance appellee executed his negotiable promissory note due and payable ninety days after delivery of the boat. On August 18, 1930, within the ninety day period, the boat was destroyed by the explosion and fire.

The written agreement further provides that the purchaser shall have and be entitled to the possession and use of the boat so long as he observes the conditions and obligations of the agreement; and that he shall indemnify, protect, and hold harmless the seller from and against any and all liability, claim, demand, charge, cost and expense in any way imposed upon or accruing to the seller arising out of or in connection with the use and occupation of the boat.

At the time of the accident the boat was in appellee's possession and use, and neither the appellant nor any person or persons acting for or in its behalf were in charge of the boat. It does not appear of record that appellant, at the time of the accident, was operating the boat in the transportation of passengers or freight upon any of the navigable waters of the United States; or that it was using the boat for any maritime purpose; or that it was engaged in any maritime business or occupation, at or before the accident.

Thereafter, and before the filing of this action, appellee brought an action against appellant on the common law side of the United States District Court at Chicago to recover damages for personal injuries and loss of personal property sustained through the carelessness and negligence of appellant in constructing, equipping, and inspecting the boat. That action is now pending and undetermined.

In the District Court exceptions were filed to the libel and were sustained. Upon failure to plead over a judgment of dismissal was entered, which constitutes the basis for this appeal.

SPARKS, *Circuit Judge*. The question presented by this appeal is whether the libel states sufficient facts to entitle appellant to limit its liability, if there be any liability.

In support of the trial court's ruling that the facts pleaded are not sufficient for that purpose, appellee relies upon three propositions: (1) At the time the boat was destroyed appellant was not the owner thereof within the meaning of the word "owner" as used in the statutes upon which appellant

relies. (2) The statutes limiting the liability of owners of vessels do not apply to one engaged solely in the manufacture of gasoline-propelled yachts and cruisers or other vessels. (3) Since the boat was not manned and operated by a master and crew of appellant, there is no liability that can be limited by a court of admiralty.

If appellee's position is correct as to any one or more of the propositions above set forth, the ruling of the trial court must be affirmed.

In determining whether appellant was the owner of the boat at the time of the accident it is quite necessary to refer to the conditions as they existed at the time of the enactment, as well as to subsequent decisions, in order to gather, if possible, the reasons which prompted the legislation and guided the courts' interpretation of it.

In *The Main* v. *Williams*, 152 U. S. 122, the court, in referring to limited liability of ship owners, said:

> "The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the statute of Massachusetts.
>
> "The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of *The Lexington*, reported under the name of the *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 344, was decided by this court. In this case the owners of a steamboat which was burnt on Long Island Sound, were held liable for about $18,000 in coin, which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among ship owners by this decision, and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is commonly known as the Limited Liability Act * * *.
>
> " 'This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties.' * * being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress."

In *Evansville and Bowling Green Packet Co.* v. *Chero Cola Bottling Company*, 271 U. S. 19, the court said:

> "The rule of limited liability of owners of vessels is an ancient one. It has been administered in the courts of admiralty in Europe from time immemorial and by statute applied in England for nearly two centuries. * * Our statutes establishing the rule were enacted to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries. * * The rule should be applied having regard to the purposes it is intended to subserve and the reasons on which it rests."

In *The "Scotland,"* 105 U. S. 24, the court, referring to the same statute, said:

> "This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle; being in the hands of corporate associations, whose members are not personally liable for acts of the employes, but risk only the amount of their capital stock in the corporation. * * Whenever the public interest requires the employment of a great aggregation of capital, exposed to immense risk, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise."

Obviously, therefore, the purpose of the statute is to promote shipping or martime commerce by limiting the liability, under certain conditions, of the owners of vessels who engage in it. The conditions are (1) that there must be an act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred for which the owner of the vessel is liable to respond; (2) the act or thing which resulted in such damage must have occurred without the privity or knowledge of the owner. Under the statute, if the accident which caused the damage was with the privity or knowledge of the owner of the vessel, he is not entitled to limitation of his liability. In other words, the statute does not protect him against liability for his direct acts or omissions, but only against acts and omissions of others which occurred without his privity or knowledge, and for which he is liable. The liability which the statute limits is an imputed one, and the imputation is raised because of his ownership and the relationship which exists between himself and those in charge of the vessel.

In the instant case it is not claimed by either party that at the time of the accident there was existing between the parties any relationship of agency or master and servant, or any similar relationship. Appellant had nothing whatever to do, either directly or indirectly, with the management, operation, or control of the boat. The relationship between the parties was merely that of buyer and seller. Part of the purchase price was unpaid and was not due, and appellee had not violated the contract of sale in any particular. Appellant merely retained the bare legal title of the boat as security for the unpaid portion of the purchase price. Indeed, the sixth paragraph of the sales agreement characterizes the contract as a *security* for the unpaid note, and we think it must be so considered. *Morgan's Assignees* v. *Shinn*, 82 U. S. 105.

It is stated in *Hyde* v. *Shine*, 199 U. S. 62, that the word "owner" has a variety of meanings—that it may include equitable as well as legal ownership, and implies something more than a bare legal title. The word "owner" is *nomen generalissimum* and its meaning is to be gathered from the connection in which it is used. *Warren* v. *Lower Salt Creek Drainage District*, 316 Ill. 345.

The vendors of a vessel under a conditional sales agreement are not liable as owners for loss of freight or for repairs or supplies furnished to the vessel. *Jones* v. *Pitcher*, 3 S. & P. (Ala.) 135, 24 Am. Dec. 716; *Thorn* v. *Hicks*, 7 Cowen (N. Y.) 696; *Leonard* v. *Huntington*, 15 Johns. (N. Y.) 298; *Wendover and Hinton* v. *Hogeboom*, 7 Johns. (N. Y.) 307. In *Morgan's Assignees* v. *Shinn*, *supra*, it was held that a mortgage of a vessel out of possession is not liable for repairs as an owner.

We are convinced that under the circumstances of this case appellant cannot be considered as the owner of the vessel in controversy within the meaning of the statute.

Our attention is called to *Flink* v. *Paladini*, 279 U. S. 59, as supporting appellant's position. In that case petitioner, who was injured upon a tug boat owned by the corporation, sued the corporation and its stockholders for damages arising out of said injury. He sought to hold the stockholders under the laws of California, which provide for personal and individual liability of the stockholders for the debts and liabilities of the corporation while they are stockholders. The corporation owned the boat and was protected by the statute. The stockholders also pleaded ownership and asked that their liability be limited. The court held that in common speech

they would be called owners in order not to defeat the manifest intent of the statute, and to that end said, "no rational distinction can be taken between several persons owning shares in a vessel directly and making the same division by putting the title in a corporation and distributing the corporate stock." We do not regard that holding to be in any way inconsistent with our ruling.

Appellant also relies on *The Milwaukee*, 48 F. (2d) 842, but in that case the agreement to sell was executory, and the performance was awaiting the doing of a future act.

A perusal of the other cases relied upon by appellant convinces us that they are readily distinguishable from the instant case as to factual content, and that they are not inconsistent with this opinion.

It has been repeatedly held that the manufacture of boats is not a maritime enterprise. *Edwards* v. *Elliott*, 88 U. S. 532; *The Winnebago*, 205 U. S. 354; *North Pacific Steamship Co.* v. *Hall Brothers Marine Railway & Shipbuilding Co.*, 249 U. S. 119; *Thames Towboat Co.* v. *The Schooner "Francis McDonald,"* 254 U. S. 242.

It must be borne in mind that appellee's cause of action is not based on appellant's ownership. Appellant is not sued as an owner but as a manufacturer or builder, and the gist of the action is appellant's direct negligence in construction, equipment, and inspection, a failure of a duty which, so far as liability is concerned, is in no way connected with maritime enterprises or with appellant's ownership. Under such circumstances, to permit appellant to limit its liability on the ground that it holds a bare legal title by reason of a conditional sale, which appellant must be considered as admitting is a mere security for the unpaid purchase price, we think is going further than the statute warrants.

We are further of the opinion that the statute purports to limit only that liability which arises from or grows out of ownership. In the instant case there is no such liability claimed, and until such liability is apparent there can be no limitation.

Decree

AFFIRMED.

Endorsed: Filed June 24, 1932, Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-fourth day of June, 1932, the following further proceedings were had and entered of record, to-wit:

Friday, June 24, 1932.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evans A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

American Car and Foundry Company, a Corporation,
4710 *vs.*
H. A. Brassert

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the fourteenth day of July, 1932, there was filed in the office of the Clerk of the Court, a petition for a rehearing, which said petition for a rehearing is in the words and figures following, to wit: